ANNUAL STATEMENT

Of the Liverpool and London and Globe Insurance Co., of Liverpool, England for the year ending Dec. 31, 1905.

Capital paid up in U. S.	
Assets	$ 12,234,948 25
Liabilities exclusive of capital and net surplus	6,972,668 49
INcome	
Premiums	6,804,856 63
Other sources	461,602 88
Total income 1905	7,266,459 51
Expenditures	
Losses	4,519,143 50
Dividends, none in the U. S.	
Other expenditures	2,277,920 06
Fire Business 1905	
Risks written	998,746,932 00
Premiums thereon	10,955,269 33
Losses incurred	3,455,760 33
Nevada Business	
Risks written	552,985 00
Premiums received	18,085 35
Losses paid	3,255 00
Losses incurred	8,255 00

GEO H. MOORE, Secy.

ANNUAL STATEMENT

Of the Western Assurance Company of Toronto, Canada.

Assets	$2,456,786 28
Liabilities, exclusive of capital and net surplus	1,707,194 49
Income	
Premiums	2,458,857 49
Other sources	71,450 25
Total income 1905	2,530,307 74
Expenditures	
Losses	1,543,164 07
Other expenditures	846,145 92
Total expenditures 1905	2,389,699 09
Business 1905	
Risks written	3,404,284 95
Losses incurred	1,141,438 82
Nevada Business	
Risks written	79,649 00
Premiums received	2,280 95
Losses paid	835 50
Losses Incurred	1,335 50

C. C. FOSTER, Secty.

ANNUAL STATEMENT

Of the National Surety Co of New York, N. Y.
Wm. B. Boyce, President
Samuel H. Shriver, Secty.

Capital deposited	$ 500,000 00
Assets	2,216,713 88
Income	
Liabilities, exclusive of capital and net surplus	1,276,553 17
Premiums	1,217,187 [illegible]
Other sources	131,[illegible]
Total income 1905	1,348,562 66
Expenditures	
Paid policy holders	452,628 02
Other expenditures	612,402 62
Total expenditures	1,065,030 64
Business 1905	
Risks written	424,727,980 00
Premiums thereon	1,438,270 15
Losses incurred	660,384 10
Nevada Business	
Amt. of risks written	31,500 00
Premiums received	159 50
Amt of said policies	[illegible]

GILBERT CONGDIN, asst. secy.

ANNUAL STATEMENT

Of the Mutual Life Insurance Company of New York

Assets	$[illegible]
Liabilities	[illegible]
Income for 1905	[illegible]
Disbursements 1905	
Paid policy holders	35,643,185 47
Paid on all other accounts	15,329,781 80
Adjustment of Real Estate valuations June 30	5,000,000 00
Total disbursements	55,972,967 27
Nevada Business	
Number of risks written	57
Amount of risks written and paid for	114,805 00
Premiums received	71,000 [illegible]
Losses and claims paid	19,486 13
Losses and claims incurred	22,136 53
Policies in force Dec. 31, 1905	853
Amt of same	1,783,880 00

W. J. EASTON Secty.

OFFICIAL COUNT OF STATE FUNDS.

STATE OF NEVADA.
County of Ormsby. s. s.

John Sparks and W. G. Douglass being first duly sworn say they are members of the Board of Examiners of the State of Nev., that on the 27th day of Feb. 06 they, (after having ascertained from the books of the State Controller the amount of money that should be in the Treasury) made an official examination and count of the money and vouchers for money in the State Treasury of Nevada and found the same correct as follows:

Coin	257,242 26
Paid coin vouchers not returned to Controller	40,911 76
Total	298,154 [illegible]

State School Fund Securities.

Irredeemable Nevada State School bond	380,000 00
Mass. State 3 per cent bonds	537,000 00
Nevada State Bonds	204,700 00
Mass State 3½ per cent bonds	313,000 00
United States Bonds	315,000 00
Total	1,996,854 66

W. G. Douglass
John Sparks

Subscribed and sworn before me this 27th day of Feb., A. D. 1906.

J. Doane,
Notary Public, Ormsby County, Nev.

IN THE SUPREME COURT OF THE STATE OF NEVADA.

Ebenezer Twaddle and Ebenezer Twaddle as Special Admr., of the Estate of Alexander Twaddle, deceased,

Plaintiffs and Respondents

V.

Theodore Winters, A. C. Winters, L. W. Winters and Samuel Longabaugh.,

Defendants and Appellants

From 2d Judicial District Court, Washoe County.

Messrs. Cheney and Massey, attorneys for Plaintiffs.

Alfred Chartz, attorney for Defendants.

DECISION

The respondents have moved to dismiss the appeal from the judgment because it was not taken within one year, and to dismiss the appeal from the order of the district court denying appellants motion for a new trial, also to strike from the records the statement on motion for a new trial upon the ground that the statement was not filed within the time prescribed by law. The appeal from the judgment is dismissed because not taken until March, 1905,. more than one year after its rendition on June 23, 1903. On that day Judge Curler of the Second Judicial District court who had tried the case at Reno and rendered the decree, made in open court and had entered in the minutes an order "that all business and all cases and proceedings that have not been completed or in the process of completion, and all new business that may be brought before the court during the absence of the presiding judge, be referred to Judge M. A. Murphy of the first judicial district court of the State of Nevada, and that he be requested to try, determine and dispose of all cases and business now before the court in the absence of the judge of this district."

Pursuant to this request Judge Murphy occupied the bench in Reno until July 31, 1903, when a recess was taken until a further order of the court. There was no other session until Judge Curler's return on August 17th. On July 17th, Judge Murphy, in open court in Reno, made an order allowing plaintiff until August 15th in which to file objection to findings, and prepare additional findings.. On August 3d Judge Murphy at Carson City, and within his own first judicial district, by an ex parte order made without affidavit of Judge Curler's absence or inability, granted the defendants until September 15, 1903, within which to prepare, file and serve their notice and statement on motion for a new trial. Later extensions were made by Judge Curler, but whether they are effectual depends upon this order, which respondents claim Judge Murphy was unauthorized to make under Section 197 of the Practice Act which provides in regard to notices and statements on motions for new trial that "the several periods of time limited may be enlarged by the written agreement of the parties, or upon good cause shown by the court, or the judge before whom the case is tried," and under district court rule XLIII which directs that "no judge, except the judge having charge of the cause or proceeding shall grant further time to plead, prove, or do any act or thing required to be done in any cause or proceeding, unless it be shown by affidavit that such judge is absent from the county, or from some other cause is unable to act."

Rule XLI provides: "When any district judge shall have entered upon the trial or hearing of any cause or proceeding, demurrer or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about said cause, proceeding, demurrer or motion, unless upon written request of the judge who shall have first entered upon the trial or hearing of said cause, proceeding demurrer or motion."

Section 2573 of the Compiled laws, passed after section 197 of the Practice Act as quoted, enacts: "The district judges of the State of Nevada shall possess equal coextensive and concurrent jurisdiction and power. They shall each have power to hold court in any county of the State. They shall each exercise and perform the powers, duties and functions of the court, and of Judges thereof, and of Judges at Chambers. Each judge shall have power to transact business which may be done in chambers at any point within the State. All of this section is subject to the provisions that each judge may direct and control the business in his own district, and shall see that it it properly performed."

We think under the minute order and circumstances related, the power inherent in Judge Curler to extend the time of filing the notice and statement became conferred upon Judge Murphy during the former's absence, and that Judge Murphy became the Judge in charge, endowed with the authority to grant the extension without the presentation of the affidavit showing the absence or inability of Judge Curler, as the rule requires before the order can be made by a Judge not having the business in charge.

Judge Curer's absence was presumed to continue until his return was shown and consequently Judge Murphy's authority based upon that absence would likewise continue. It is said that under the first statute mentioned, the language that "the court or judge before whom the case was tried" may extend the time invalidates the order, because Judge Murphy was not the judge before whom it was tried, and that he was not the court after he returned to Carson City, where he made the order. In a narrow technical sense this may be true, if we do not look beyond the strict letter of the statute. But not so if we consider the intent and purpose of the enactment, and construe it in the light of reason as applied to the ordinary rules of practice, and give due weight to the later section. Apparently the object of this legislation was to prevent the granting of extensions and the meddling of judges in cases which they had not tried or which were not properly under their control, and yet in the case of the absence or inability of the judge who tried the action, to grant relief, or allow extensions to be made to deserving litigants.

The argument advanced concedes that if Judge Murphy had gone to Reno and entered the order in open court it would have been good, but under this contention if he had stepped through the door into the chambers and made it, it would have been void. Orders extending the time for filing age business usually, or properly transacted in chambers and under Section 2573 can and ought to be made as effectually in any part of the State by the judge having the case in charge, as if made by him in chambers or in open court. Judge Murphy was merely acting for Judge Curler during his vacation, but by analogy the construction claimed, if adopted, would, in every case where a district judge dies, resigns or is succeeded, invalidate the orders extending time under section 197 made out of court by his sucessor in office, although they are of that character ordinarily granted in chambers. This would mean a distinction and two rules for filing orders of the same kind and that the judge who had tried the cause as Judge Curler had done in this instance, could make the order in chambers, while his successer could so make it only in the cases tried by him, and would have to be in court to make these simple orders extending time in actions which had been previously tried by another judge.

Appellants desired and were entitled to the time granted for the purpose of enabling them to secure from the court reporter who had left the State, a transcript of the testimony given on the trial, which would enable them to properly prepare the statement.

Under Section 2573 Judge Curler could have made an order granting them the extension at any place in the State, and as during his absence Judge Murphy was requested by the Court minutes to attend to all business for him, we conclude that he was empowered to make the order at Carson City as he did, and as Judge Curler could have done, and that it was not necessary for him to make the trip to Reno and undergo the formality of opening court to enter ex parte orders simply extending time, such as are usually made out of court.

The motion to dismiss the appeal from the order overruling the motion for a new trial and to strike out the statement is denied.

ON THE MERITS

This action was brought by Alexander Twaddle in his life time and by Ebenezer Twaddle, as co-owners, for 450 miners inches running under a six inch pressure of the waters of Ophir Creek, alleged to have been appropriated by their grantors in the year 1856 "by means of dams, ditches and a flume" for the irrigation of their ranch containing 203.92 acres in Washoe county. The answer denies the allegation of the complaint as to the ownership by the plaintiffs, Winters, of a tract of land about one mile wide and two miles long, and alleges appropriations by them or their grantors aggregating 600 inches flowing under a four inch pressure, by the year 1867, which are stated to be prior to any diversion of the water by the plaintiffs, and asserts a claim for defendant, Longabaugh, to 180 inches for fluming wood, lumber and ice from large tracts of timber lands owned by him, and for domestic use and irrigating garden on forty acres of Ophir.

Witnesses appeared to sustain, and others to dispute plaintiffs' right as initiated a half century ago, and the same is true regarding the claims of these defendants. The record affords a glimpse of pioneer history at a period previous to the [illegible] State into the Union, and portrays the building and decay of saw and quartz mills and the rise and decline of towns by the banks of the stream, the waters of which are here in litigation. One witness testified that the Hawkins ditch, now known as the Upper Twaddle ditch, was completed in 1857, and that he turned the water into it that year. Others stated that water was running in the ditch about that time, and that there were apparently in the same place and of about the same capacity as at present.

On behalf of the defendant other witnesses testified that they went over the ground and saw no ditch and that none existed there during those earlier years. It is unnecessary for us to detail the conflicting portions of the evidence. Those were carefully considered by the district court and for the reasons stated in its decision, enforced by statements in fact made many years before any controversy arose, the finding that the ditch was constructed and a prior appropriation of water made through it in 1857 finds ample support. At first the Twaddle ranch land was plowed for only a garden and a small piece of grain and but little hay was cut. A reasonable time was allowed in which to extend and complete the use of the water that would flow through the ditch and the quantity of land irrigated was increased. The lower Twaddle ditch was constructed from Ophir Creek at some time prior to 1869 and runs to and irrigates the eastern portion of the plaintiffs' ranch. It is shown that since that year at least their lands have been in practically the same state of cultivation and irrigation that they were in at the time of the commencement of this action, and that during that period plaintiffs' used all the water they needed from Ophir Creek without interruption except in 1887, 1898 and at the time [illegible] began, it appears that the plaintiffs' had not materially increased their appropriation in [illegible] while Theodore Winters admitted upon the stand that during the last ten or fifteen years he had been using twice as much water from Ophir Creek in addition to that from other streams, as he used during the first ten years that he cultivated his lands. As he claims and uses more than the plaintiffs, we conclude that this large increase in his diversion of the waters of the streams since the completion of their appropriation which has remained stationary may account for the shortage and dispute.

By consent of the parties in open court the district judge, accompanied by a civil engineer who had testified as a witness for the defendants, viewed the premises and made measurements. At the point of least carrying capacity of the upper Twaddle ditch, which is the old square flume near the Bowers' Mansion and grave, he measured the flow at 184 inches and the water lacked more than two inches of reaching the top. A surveyor had testified for the plaintiffs that its capacity was 182 inches at this point, and that the capacity of 100 feet of old flume remaining no nearer the head of the ditch which had been impaired by age and abandoned, and supplanted by a new V flume built above the old one by the plaintiffs in 1905, was 150 inches. At this point the judge found that 184 inches of water which he had measured below about filled the new V flume, and he estimated that the old flume would carry from 200 to 200 inches. From his examination of the premises and the character of the soil the court was of the opinion that the plaintiffs required, and were entitled to at least the amount of water they had flowing in the flume at the time he made the examination, and he decreed them a prior right to 184 miners inches running under a four inch pressure or 3.3450 cubic feet per second from April 15th to Nov. 15th of each year, and 20 inches or 2.6 of one cubic foot per second for domestic use and watering stock at other times. It is claimed the amount allowed is not warranted by the evidence because more than the capacity of the upper Twaddle ditch as shown by the testimony mentioned being it at 182 inches at the point above the mansion and at 150 inches along the 100 feet of old flume through which the water flowed prior to 1900.

It is not necessary to determine whether the court on its own examination and measurement may allow a quantity beyond the range of the evidence, nor whether the surveyor could actually estimate the capacity of the 100 feet of old flume without knowing the volume and velocity of the water that entered it, nor whether the variation of one part in nineteen on the difference between the engineer in his measurement and that of 184 by the judge should be disregarded as too trifling to be material and as a slight discrepancy to be expected for the judgment for the 20 inches which defendants' claim should be deducted because in excess of the capacity of the upper ditch and flume before the construction of the V flume in 1900 is answered by the finding of the court that the plaintiffs and their grantors had for more than thirty-one years before the commencement of this suit used a portion of the water through the lower part of the ditch. It is urged that 184 inches is more than required for the irrigation of plaintiffs' ranch and that this is especially so because a few of their 170.45 acres of cultivated land lies above the upper ditch from Ophir Creek and a small portion is naturally swampy. The quantity of water allowed by the decree seems very liberal, both for irrigation and for domestic use and watering stock. Engineers and others testified that one half and three fifths of an inch of water per acre was sufficient, while for the plaintiffs, farmers from the vicinity varied in their estimates of the amount necessary from one and one-half to three and one half inches per acre.

The evidence indicated that the plaintiffs had used as much water as that awarded to them and more and had uniformly produced good crops. Much of their land is sandy with considerable shale. After examining the soil and viewing the quantity of water as it ran on the premises, the court agreed with the testimony of the plaintiffs that that amount was necessary and adopted a mean between the highest and lowest estimates. The quantity of water required varies greatly with the soil, seasons, crops, and conditions, and we cannot say that the allowance is excessive.

Alexander Twaddle testified that there were times during the summer evidently about a week after the land had been irrigated, when it was not necessary to use as much as the upper ditch full of water. On such occasions and whenever it is not needed by the plaintiffs it should be turned to the defendants, if they have any beneficial use for it and not permitted to waste. It may be implied by the law, but it is better to have express specify, and especially so in this case, in view of the testimony stated and of the perpetual injunction that the award of water is limited to a beneficial use at such times as it is needed, Gotelli v. Cardelli. The point and purpose of diversion may be changed if such change does not interfere with the prior rights.

Under the testimony of Alexander Twaddle that the irrigating season closes about the first of October, and that sometimes he used water a little later, we think probably the decree should limit plaintiffs' right for irrigating purposes to October 15th. This may allow defendant Longabaugh to flume wood a month earlier at this season when the water is low, and allow Winters more for watering stock without material injury to the plaintiffs. Although his flume was erected many years ago Longabaugh did not show any prior appropriation and the decree properly enjoins him from interfereing with that part of the water of Ophir Creek awarded to the plaintiff, because he ran their water in his flume past their ditch and into one owned by Winters, and joined with the other defendants in answering and resisting the rights of plaintiffs. The decree does not prevent him from taking any water in the creek in excess of the amount awarded to plaintiffs. Nor does it in any way interefere with the water belonging to him coming from other sources. This he may turn into Ophir Creek and take out lower down provided he does not diminish the flow to which plaintiffs are entitled.

On May 30, 1877, John Twaddle, the father and predecessor in interest of the plaintiffs, conveyed to M. C. Lake "one-third of that certain water ditch and flume known as the Twaddle ditch, leading from what is now known as the Ophir Creek to the land of said Twaddle, southerly from said creek through the lands of C. F. Wooten and M. C. Lake, with the privilege of running water through said flume and ditch to what is known as the Bowers Mansion or grounds, the expense of maintaining said ditch and flume to be paid by each in proportion to their interests in same." It will be noted that this language does not purport to grant any water but rather the right to convey water and that it amounts to a sale of a third interest in the ditch with at least the privilege to that extent of running in it water which Lake had, or might appropriate. Later the defendant Theodore Winters, acquired the Bowers Mansion and grounds through conveyances which did not mention any interest in this ditch. It does not appear that Lake or his grantors ever made any use of the ditch or ever contributed towards its repair.

Alexander Twaddle stated on the stand that he did not claim all this ditch and that the plaintiffs owned two thirds of it. Whether under this deed the one-third interest in the ditch became appurtenant to the Bowers land when it was new itself for its irrigation, and later passed with the land without being mentioned, and whether after the lapse of twenty-five years without any use or contribution towards its repair the grantee of Lake has a third interest as a co-owner in the ditch and that part of the flume which has not been superceeded by the new one built by plaintiffs, are questions which we need not determine, for they, and that part of the judgment of the court which gives the plaintiffs the "exclusive use of the upper Twaddle Ditch and Flume," are not within the allegations of the pleadings which contain no reference to the exclusive use of, or a third or any interest in the ditch.

Under the assertion in the complaint of the appropriation of water "by means of certain dams ditches and a flume" the court properly decreed to plaintiffs the right to use the water through either or both the ditches running to their lands. Take would have that right in the upper ditch if their interest in it is only an undivided two-thirds as the court has given them jointly with the defendants in the lower ditch, but whether the grantee of Lake owns and can assert a right to an undivided one-third interest, is a question as foreign as the owner's of the mansion, and one which ought not to be determined by the movement in the absence of any issue [illegible] concerning it. The decree specifically excepted to [illegible] twelve in this regard.

Patents for defendants' lands [illegible] along the banks of Ophir Creek were issued to their grantors [illegible] the passage of the Act of Congress of July 26, 1866 [illegible] for this reason a vested Common Law riparian right to the flow of the waters of Ophir Creek accrued of which they could not be [illegible] that Act. If this were not [illegible] might as well be considered [illegible] the circumstances shown to [illegible] that right by acquiescence in [illegible] tinued diversion of the water [illegible] fits for a period many times longer than that provided by the [illegible] limitations, but in this connection [illegible] course it is not [illegible] to consider seriously or at length an argument by which [illegible] have us overrule [illegible] cisions of long standing in this and other arid states [illegible] Court of the United States, such as Jones v. Adams, Reno Smelting Works v. Steptoe and Broder v. Water Co. declares that this statute was rather the voluntary recognition of a pre-existing right to water constituting a valid [illegible] beneficial use, than the establishment of a new one. As time passes it becomes more and more apparent that the law of ownership of water by prior appropriation for a beneficial purpose is essential under our climatic conditions to the general welfare, and that the Common Law regarding the flow of streams which may be unobjectionable in such localities as the British Isles and the coast of Oregon, Washington and northern California where rains are frequent and fogs and winds laden with mist from the ocean prevail and moisten the soil, is unsuitable under our sunny skies where the lands are so arid that irrigation is required for the production of the crops necessary for the support and prosperity of the people. Irrigation is the life of our important and increasing agricultural interests which would be strangled by the enforcement of the riparian principle.

Congress is appropriating millions for storage and distribution and our Legislature have recognized the advantages of conserving the water above for use in irrigation instead of having it flow by lands of riparian owners to finally waste by sinking and evaporating in the desert. The California decisions cited for appellants may no longer be considered good law even in the state in which they were rendered.

In the recent case of Kansas v. Colorado before the Supreme Court of the United States, Congressman Needham testified that irrigation had doubled and trebled the value of property in Fresno and King counties, California, that they had to depart from the doctrine of riparian rights and under that doctrine it would be difficult to make any future development; that there has been a departure from the principles laid down in Lux v. Haggin, because at that time the value of water was not realized, that the decision has been practically reversed by the same court on subsequent occasions, and that the doctrine of prior appropriation and the application of water to a beneficial use is in effect in force now in that State.

We must decline to award the defendants the waters of the stream as riparian proprietors and patentees of the land along its banks prior to 1867.

The case will be remanded for a new trial unless there is filed on the part of the plaintiffs within thirty days from the filing hereof, a written consent that the judgment be modified by limiting the use of the 184 inches, or 3.3450 cubic feet per second of water awarded to the plaintiffs, to such times as may be necessary for the irrigation of their crops or lands or for other beneficial purposes, between April 15 and October 15 of each year, and by allowing plaintiffs for the remainder of the time the 20 inches awarded to them, when necessary for their household, domestic and stock purposes, and by striking from the decree the words:

"It is further ordered adjudged and decreed that said plaintiffs have the exclusive right to use and the exclusive use of said Upper Twaddle Ditch and Flume at all seasons of the year."

If such consent is so filed the district court will modify the judgment accordingly and as so modified the judgment and decree will stand affirmed.

Talbot, J.

We concur:
Fitzgerald, C. J.
Norcross.

Quarterly Report.

Ormsby County, Nevada.
Receipts.

Filed Feb. 1, 1906.

Balane in County Treasury at end of last quarter	$40023 36¾
County licenses	701 05
Gaming licenses	1057 50
Liquor licenses	310 20
Fee of Co. officers	531 46
Rent of county bldg.	250 00
Poll taxes	620 48
1st, instalment taxes	11994 21½
Special school tax	1719 90½
Slot machine license	282 00
Cigarette license	42 30
Semi-Annual Set. State Treas	531 78
Delinquent taxes	22 80½
Sale of horse	10 00
Sale of ferry	12 00
Rent of W. Bowers	15 00
Total	61,077 36¾

Disbursements.

State fund	6692 82½
General fund	2732 32
Salary fund	2290 00
Agl Assn. Bond Fund, Series A. issue	250 00
Agl. Assn. Bond Fund, Series B. issue	100 00
Co. School Fund, Dist. 1	388 95
Co. School fund, Dist. 2	151 20
Co. School fund Dist. 3	99 70
Co. School Fund Dist. 4	24 00
State School fund, Dist. 1	2605 00
State School fund, Dist 2	100 00
State School fund Dist 3	150 00
State School fund, Dist 4	137 00
Special building	3570 00
Set of library, No. 2	95 00
Total	21,968 59½

Recapitulation.

Cash in Treasury October 1905	40023 36¾
Receipts from Oct. 1st to Dec 30, 1905	21054 00½
Disbursements from Oct. 1st to Dec 30, 1905	21968 59½
Balance cash in County Treas. January 1, 1906	39108 77¾

H. DIETERICH.
County Auditor.

Recapitulation

State fund	102 86
General fund	6917 03½
Salary fund	5725 78
Co. School fund	3218 71
Co. School Dist. 1. fund	7678 22½
Co. School Dist. 2. fund	139 64
Co. School Dist. 3. fund	190 26½
Co. School Dist. 4. fund	425 25
State School Dist. 1. fund	1898 00
State School Dist. 2. fund	77 51
State School Dist. 3. fund	371 39
State School Dist. 4. fund	19 22
Agl. Assn. Fund A.	689 82½
Agl. Assn. Fund, B.	86 86½
Agl. Assn. Fund Special	1918 99
Co. School Dist. fund - special	13735 90½
Co. School Dist. fund 1, library	108 46
Co School Dist. fund 3, library	6 54
Co. School Dist. fund 4. library	6 10
Total	39108 77¾

H. B. VAN ETTEN
County Treasurer